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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 683.

ALBERT GREGOR KAMMERER,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR ATLANTIC COAST LINE RAILROAD COMPANY IN OPPOSITION.

CHARLES L. GOWEN,
CHRIS B. CONYERS,
Attorneys at Law for the Respondent,
National Bank of Brunswick Building,
Brunswick, Georgia.

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Opinions.

The opinion of the United States District Court on the motion for new trial (R. 29-39) is not reported. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 218 F. 2d 149. The opinion of the United States Court of Appeals for the Fifth Circuit on the first appeal is reported at 205 F. 2d 525.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 7, 1955. There was no motion for rehearing. The petition for writ of certiorari was filed March 29, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented.

Whether the decision of the Court of Appeals that too many errors infected the verdict upon which judgment was rendered in this case in the District Court to permit it to stand is correct.

Statement.

Petitioner filed his petition in the United States District Court for the Southern District of Georgia, Brunswick Division, to recover damages from respondent for the alleged tortious killing of petitioner's son, Albert Gregor Kammerer, Jr., as a result of a collision between an automobile driven by petitioner's son and a train owned and operated by respondent in the City of Brunswick, Georgia. Upon trial the jury returned a verdict in favor of petitioner and against respondent and judgment was entered accordingly thereon by the District Court.

Respondent timely filed its motion for judgment notwithstanding the verdict, or in the alternative motion for a new trial, which motion was overruled by the District Court. In due course respondent filed its notice of appeal from the judgment rendered and the Court of Appeals reversed this judgment.

The evidence disclosed that the accident complained of occurred at approximately 1:30 A. M. at the intersection of Albany and Q Streets in the City of Brunswick where a spur track of respondent's railroad crosses Albany Street. Albany Street runs in generally a north and south direction and the spur track crosses at an angle of roughly east northeast to west southwest. The deceased (petitioner's son) was driving his automobile on Albany Street in a

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northerly direction and ran into the side of respondent's train, which consisted of an engine and one freight car coupled ahead of the engine. Respondent's employees in charge of the train had, just prior to the accident, been operating a train consisting of approximately 50 cars on respondent's main line which parallels Albany Street and lies two blocks to the east. Being in need of another empty freight car for the night's operation, the engine and one car were cut off the main unit and proceeded up the spur track to pick up a car which had previously been spotted for unloading on the spur track approximately fifteen feet west of Albany Street. When approaching Albany Street from the east, the conductor was stationed on the lead end of the freight car with a lantern. Before entering Albany Street, the unit was brought practically to a stop while the conductor looked to see if any automobile was approaching. The conductor had a clear view to the south (the direction from which the deceased approached) of at least one-half mile, the street being straight and level. Seeing no traffic approaching, the conductor gave the go ahead signal and the unit proceeded across Albany Street and coupled to the freight car there spotted. The unit came to a stop blocking Albany Street with the engine projected some five to six feet on the pavement from the east and the freight car ahead across the remaining portion of the street. The conductor immediately walked to the center of the car next ahead to ascertain whether or not it was empty. Upon opening the door, he heard a crash as petitioner's son ran into the side of the train.

The night was clear and dry. The moon was setting. The only evidence which would in any manner have indicated any unusual conditions existing at the time of the collision which could have affected the vision of petitioner's son or could have prevented him from seeing the train

standing on the crossing was testimony of witnesses of the petitioner that the moon shining through trees cast shadows over the crossing.

The evidence was uncontradicted that petitioner's son was exceeding the speed limit of the City of Brunswick at the time of the collision. The witness, Anderson, estimated the speed of the automobile at 50-75 miles per hour (Record, p. 501). Officer Woodham gave as his estimate of the speed of the automobile approximately 50 miles per hour (Record, p. 462). The witness, Drummond, testified the car was going too fast to estimate the speed (Record, p. 551).

The evidence disclosed that in the City of Brunswick there are only three paved streets running in a northerly and southerly direction which could be used by any person leaving the City of Brunswick in the direction in which the deceased was driving. The particular spur track, on which the collision complained of occurred, crosses all three of these paved streets (Record, p. 246). The deceased had been a resident of the City of Brunswick all of his life with the exception of approximately four years during which time he was in the armed forces and at college (Record, p. 245).

The photographic exhibits introduced in evidence clearly show that the crossing where the accident complained of occurred was well marked with crossing signs. Although these signs were not as a matter of fact the "X signs" as required by rules of the Georgia Public Service Commission, they were approximately four feet square in dimensions with large letters painted thereon indicating "Railroad Crossing, Unsafe Crossing". These signs were maintained in compliance with Sec. 95:1801 *et seq.* of the Code of Georgia which prescribes regulations for Unsafe Crossings as designated by the governing county authorities.

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It was admitted by employees of the respondent that the front headlight of the engine (which was adjacent to a box car) was not burning at the time of the collision, however, the rear headlight of the engine ~~was~~ pointed in the direction in which the train was next to have moved was burning. The front headlight of the engine was not burning because with it on adjacent to the box car the engineer could not have seen the signals given by the conductor ahead upon which he depended for movement of the train. It was admitted further by employees of the respondent that no flares were burning at the crossing and that no warning lights were set out by any member of the crew.

The only evidence introduced by petitioner to establish any unusual condition which would have prevented the deceased from observing respondent's train upon the crossing (other than the testimony of the witness, Miller) was the testimony of various witnesses who visited the scene of the collision approximately one month thereafter and testified as to shadows being cast upon the crossing. These witnesses testified that it was difficult to observe a box car of respondent which was parked some fifteen feet west of Albany Street on the night of the experiment conducted approximately one month after the date of the collision. Upon the present trial, petitioner's witness, Deaver, (a member of the police force of the City of Brunswick) testified that the experiments conducted were made driving up and down Albany Street, but as soon as the automobile was turned toward the box car parked west of Albany Street it was clearly visible (Record, p. 287). This witness testified further that upon the night of the experiment had there been a railroad box car parked upon the crossing over Albany Street, he would have observed the same had he been driving at a legal rate of speed and exercising ordinary care for his own safety (Record, p. 286). This witness

testified further that the shadows observed by him on this particular night were not such an obstruction to vision which would not have been dispersed by properly working headlights of an automobile (Record, p. 287).

We respectfully submit that there was no evidence introduced in behalf of petitioner as to any unusual conditions existing at the time of the collision which would take this case out of the rule established by the appellate courts of Georgia in the cases of *Pollard* v. *Clifton*, 62 Ga. App. 573 (9 S. E. 2nd 782); *Bassett* v. *Calloway*, 72 Ga. App. 97 (33 S. E. 2nd 112); *Baker* v. *A. C. L.*, 52 Ga. App. 624 (184 S. E. 381); and *A. C. L.* v. *Marshall*, 89 Ga. App. 740 (81 S. E. 2d 228). Petitioner's own witness (Deaver) testified that the shadows across the crossing were not such which would not have been dispersed by properly working headlights.

The bell on respondent's engine was ringing and the engine was standing on Albany Street directly in the path of the deceased's car. Certainly this was sufficient warning of itself of the presence of the train on the crossing to any motorist proceeding with due caution for his own safety.

The Court of Appeals held "the real question as to liability is one of comparative negligence" and questions of comparative negligence and the duty on the deceased to exercise ordinary care to avoid the consequences to himself of any negligence of respondent are matters to be weighed by the jury. *Georgia Power Company* v. *Maxwell*, 52 Ga. App. 430 (183 S. E. 654); *Southern Ry. Co.* v. *United States*, 197 F. 2d 922.

At the first appearance of this case before the Court of Appeals,[1] in an effort to prevent a second reversal because of "out of bounds" conduct of plaintiff's counsel, the court

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[1] *Atlantic Coast Line Ry. Co.* v. *Kammerer*, and *vice versa*, 205 F. 2d 525.

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went to considerable pains to put counsel on notice that an opening statement in which he argued the case fully, "claiming that only a railroad company could escape prosecution for such wilful and wanton negligence", before any evidence was introduced, "tended to create such an atmosphere of bias or prejudice" as would constitute grounds for reversal.[1]

Instead of confining his opening statements to the facts to be proven by *relevant, competent, and material evidence,* plaintiff's counsel decided not to heed the warning of the Court of Appeals but instead made an opening statement that was filled with irrelevant, prejudicial, and incompetent statements. Petitioner's counsel evidently deliberately decided not to follow the law of the case as declared by the Court of Appeals evidently hoping that a second jury verdict, though infected with error, might be permitted to stand.

Argument.

Petitioner's brief in support of the petition for certiorari makes the contention that liability in the case at bar "was plain" and "was fully established", all of which is not supported by the evidence or the law.[2] The respondent argued in the Court of Appeals and believes now that the motion for judgment n.o.v. should have been sustained.

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[1] The reason only plaintiff's counsel's opening statement was commented upon when this case was first before the Court of Appeals is explained by the fact that counsel's arguments to the jury were not included in that record.

[2] The trial judge held during the trial that it was a close case. He said in overruling the plaintiff's motion for a directed verdict: "I think if the jury believes your witnesses, they will find for the plaintiff. If they believe the defendant's witnesses, they will find for the defendant. I mean taking them as a whole. I think it is a disputed issue of fact to be determined by the jury" (Record, p. 605).

While the Court of Appeals did not agree with us, we respectfully submit that the proximate cause of the death of petitioner's son was his own negligence.

The Appellate Courts of Georgia have consistently held that when a motorist drives into the side of a train which is standing on, or moving over, a crossing his own negligence must be considered the proximate cause of the collision, thus barring a recovery against the railroad company unless some unusual circumstances existed at the time, such as fog, smoke, or other atmospheric conditions which would require the railroad to furnish some extra warning.

> "We think the Judge properly withdrew the case from the jury and directed the verdict. While ordinarily the question whether a plaintiff is barred from recovery by his own negligence is for the jury, this is one of those cases where such a conclusion should be reached as a matter of law. Without deciding whether the blocking of the crossing for longer than the time provided by the municipal ordinance could or could not have figured in the case if the allegation had been proved, the evidence failed to show that the ordinance had been violated. The evidence showed that the plaintiff was familiar with the crossing, though he stated he did not know about the incline, because he had not traveled the road at night. There was no evidence that it was misty or raining or why the view was obstructed or made difficult except the incline of the tracks. Irrespective of whether the railroad was negligent in failing to provide any or all of the safeguards as contended by the plaintiff the uncontradicted evidence including photographs of the scene showing the crossing, incline, dip in the road, etc. shows that the plaintiff could easily have seen the cars on the tracks if his automobile lights had been burning properly (and he swore they were) in ample time for him to have stopped his car. The night was

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dark which rendered the cars more susceptible to vision and light reflections than would otherwise have been true."

Burnett vs. *Louisville and Nashville Bar Company,* 197 S. E. 663, 58 Ga. Appeals 64.

"The driver of an automobile who knows that he is approaching a railroad crossing in the night time and fails to reduce the speed of his car so that it may be stopped within the range of his lights when he discovers that a train of cars is stopped or passing over such crossing is guilty of such a lack of ordinary care as will prevent a recovery from the railroad."

Pollard, Receiver vs. *Clifton,* 9 S. E. 2nd 782, 62 Ga. Appeals, 573.

"Petitioner alleged that her deceased husband was driving on Fort Benning Boulevard and approached a crossing of the Central of Georgia at a point beyond Baker Village at approximately three o'clock A. M. in the morning while it was still dark. It is alleged that the defendant permitted a freight train to remain stationary with the freight cars thereof across Benning Boulevard and blocking same. Benning Boulevard was straight for a distance of one hundred yards from the crossing. The acts of negligence alleged against the defendant were as follows: (a) In placing a freight car across said Benning Boulevard at night while it was dark and allowing same to remain motionless across said highway; (b) In allowing its freight car to remain across said Benning Boulevard in the darkness of the night when it should have known that same would not be visible to motorists traveling from Columbus against the dark background on the Benning side of the highway; (c) In allowing said freight car to remain across said highway without having a flag-

man with a lighted lantern or other light in the highway on the Columbus side to warn motorists using said highway of the presence of said freight car; (d) In not having installed the said crossing with a warning signal light; (e) In not having installed the said crossing with a warning signal bell; (f) In not having installed near said crossing cross arms to be lowered across said highway when said crossing was in use by defendant."

The Court in affirming the judgment of the Superior Court of Muscogee County in sustaining a general demurrer to the petition said

> "The mere blocking of a public crossing at night is not negligence. As amended the petition shows that Colonel Bassett had a straight stretch of road between him and the railroad crossing for a distance of one hundred yards. In the absence of an allegation to the contrary it would be presumed that Colonel Bassett was familiar with the crossing. No reason was alleged why Colonel Bassett's lights would not have shone upon and revealed the presence of the freight car unless it was the fact that the lights reflected beneath the freight car. In which case the lights were in improper condition. It cannot be questioned that it is negligent to operate an automobile at night with lights which would only shine underneath a freight car and not upon some part of it from a distance of fifty feet. Therefore it appears from the petition that Colonel Bassett was negligent if he drove his car at such a speed that he was unable to stop within the distance of his lights at the time whether the lights at the time were required by law or in improper condition.
>
> *Bassett* vs. *Calloway,* 33 S. E. 2nd, 112; 72 Ga. Appeals, 97.

See also *Baker* vs. *Atlantic Coast Line Railroad Company,* 184 S. E. 381; 52 Ga. Appeals, 624.

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See also *Atlantic Coast Line Railroad Company* vs. *Marshall,* 81 S. E. 2nd, 228, in which the Court of Appeals of Georgia held

"The Court erred in denying the motion for a new trial on the general grounds because the evidence did not authorize a finding that the defendant was negligent in any particular which contributed to the plaintiff's injuries. The mere act of stopping railroad cars on a crossing for such a length of time as might be reasonably necessary in conduct of the railroad's business would not constitute negligence on the part of the defendants. Other facts must be shown to place on a railroad and its employees the duty to give the traveling public warnings of the presence of the train on the crossing in addition to that which is given by the train itself. Mann *vs.* Central of Georgia Railroad Company, 43 Ga. Appeals, 708; 160 S. E. 131; and Gay *vs.* Smith, 51 Ga. Appeals, 615; 181 S. E. 129.

"In this case the only other fact relied on to impose the additional duty on the part of the defendants was the presence of fog, smoke and extreme darkness in the atmosphere. It is conceded by the defendant in error and correctly so that the factor of fog and smoke is necessary to establish liability in this case and the decisions are clear and numerous on this question. Georgia Northern Railroad Company *vs.* Stains, 88 Ga. Appeals, 6; 75 S. E. 2nd, 833; and Brinson *vs.* Davis, 32 Ga. Appeals, 37; 122 S. E. 643. Georgia Law requires headlights on motor vehicles operated on the public streets or highways which will illuminate 500 feet. Code of Ga. Section 68-316.

"In order to establish liability in this case it was necessary for plaintiff to prove by competent testimony that the fog and smoke impaired the driver's visibility to such an extent that he did not have clear vision for 500 feet otherwise the fog and smoke

> would not have been a material factor. The evidence in this case failed to show to what extent visibility of the driver was impaired which left the question of liability one of mere conjection. No witness testified as to the extent of the impairment of the driver's visibility either directly or by proof of circumstances from which a conclusion could legitimately be drawn."

The Courts of Georgia have extended this doctrine to refuse to allow a recovery by a guest in an automobile despite the fact that the negligence of the driver was not imputable to him. In *Evans* vs. *Georgia Northern Railroad Company,* 52 S. E. 2nd, page 58, 78 Ga. Appeals 709, the plaintiff alleged that he was riding in an automobile driven and under the exclusive control of his wife and belonging to his mother when he received certain injuries as a result of a collision with defendant's train. In affirming the judgment of the trial court sustaining the general demurrer to the petition the Court held

> "It clearly appears from the petition in the present case that the sole proximate cause of the collision was the failure of the operator of the automobile with full knowledge of the conditions then existing to exercise ordinary care and control the automobile so as to avoid striking the train that was actually proceeding across the intersection and the trial judge did not err in sustaining the general demurrer of the defendant and in dismissing the petition."

This line of decisions is followed in other jurisdictions, see *Good* vs. *A. C. L. Railroad Company,* 142 Federal 2nd, page 46; *Froberg* vs. *C. I. & L. Railway,* 93 Federal 2nd, 259; *L. & N. Railroad Company* vs. *Outlaw, et al.,* 67 2nd, 367.

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These authorities clearly show that under any view this was a close case with ample evidence to support a verdict for the defendant if the jury returns one.

This was a case where improper argument, the introduction of irrelevant and incompetent matter, and the practice of asking improper questions would be expected to affect the result.[1]

Petitioner's counsel went into the case in the face of the injunction from the Court of Appeals to see that irrelevant, immaterial, and prejudicial matters were eliminated. Instead of governing himself accordingly, he went resolutely and unheedingly along the path the Court of Appeals had warned against and became the author of his own misfortune against which he now so bitterly complains.

> "In the trial of cases to a jury in the federal courts, the arguments of counsel must be confined to the issues of the case, applicable law, the pertinent evidence, and such legitimate inferences as may properly be drawn therefrom. Union Electric Light & Power Co. *vs.* Snyder Estate Co. (C. C. A. 8), 65 F. 2d 297, 302."
>
> *London Guarantee & Accident Co.* vs. *Woelfe*, 83 F. 2d 325, 342.

In *Nations* vs. *United States* (C. C. A. 8) 32 F. 2d, 598, it was held that the prejudicial and improper remarks there complained of were not cured by the mere sustaining of objections by the court; and to the same effect is *New York Life Ins. Co.* v. *Doerksen* (C. A. A. 10), 75 F. 2d, 96, 102.

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[1] The Court of Appeals recognized that the practice adopted by the plaintiff's counsel at the trials of asking questions which a 'distinguished member of the local bar' was bound to know were improper and then withdrawing them after objection is made was made damaging by the mere asking of the questions. Examples of this will be found at R-196-197; R-201; R-204; R-205; R-230; R-237; R-242; R-243; R-265; R-276; R-278; R-281; R-289-290; R-310; R-318; R-332; R-333; R-336; R-382; R-406; R-412-413.

This Court has itself reversed a verdict for damages for improper conduct of counsel in undertaking to set up an aura of prejudice against the defendant railroad company. As Mr. Justice Stone said in *New York Central R. Co.* v. *Johnson,* 279 U. S. 310; 48 S. Ct. 300; 73 L. Ed. 706:

> "Such a bitter and passionate attack on petitioner's conduct of the case, under circumstances tending to stir the resentment and arouse the prejudice of the jury, should have been promptly suppressed. See Masterson *v.* Chicago & N. W. R. Co., 102 Wis. 571, 574, 78 N. W. 757, 6 Am. Neg. Rep. 245; Gulf, C. & S. F. R. Co. *v.* Butcher, 83 Tex. 309, 316; 18 S. W. 583; Tucker *v.* Henniker, *supra,* at 322 (41 N. H.); Monroe *v.* Chicago & A. R. Co., 297 Mo. 633, 644, 249 S. W. 644, 257 S. W. 469. The failure of the trial judge to sustain petitioner's objection, or otherwise to make certain that the jury would disregard the appeal, could only have left them with the impression that they might properly be influenced by it in rendering their verdict, and thus its prejudicial effect was enhanced. See Hall *v.* United States, 150 U. S. 76, 81, 37 L. ed. 1003, 1007, 14 Sup. Ct. Rep. 22; Graves *v.* United States, 150 U. S. 118, 121, 37 L. ed. 1021, 1023, 14 Sup. Ct. Rep. 40; Wilson *v.* United States, 149 U. S. 60, 68, 37 L. ed. 650, 652, 13 Sup. Ct. Rep. 765. That the quoted remarks of respondents' counsel so plainly tended to excite prejudice as to be ground for reversal is, we think, not open to argument. The judgments must be reversed with instructions to grant a new trial.
>
> "Respondents urge that the objections were not sufficiently specific to justify a reversal. But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy . . . of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and

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impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice. See Union P. R. Co. *v.* Field, 69 C. C. A. 536, 137 Fed. 14, 15; Brown *v.* Swineford, 44 Wis. 282, 293, 28 Am. Rep. 562. Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error. Bransfield *v.* United States, 272 U. S. 448, 450, 71 L. ed. 345, 346, 47 Sup. Ct. Rep. 135.

"As there must be a new trial, attention should be directed to other objectionable conduct by respondents' counsel in the course of the trial; their repeated assertion, without supporting evidence, that the defense was a 'claim agent defense'; references to petitioner as an 'eastern railroad'; and statements that the railroad had 'come into this town,' and that witnesses and records had been 'sent on from New York,' for the trial of the cause. Such remarks of counsel, and others of similar character, all tending to create an atmosphere of hostility toward petitioner as a railroad corporation located in another section of the country, have been so often condemned as an appeal to sectional or local prejudice as to require no comment. See Cherry Creek Nat. Bank *v.* Fidelity & C. Co. supra; Dolph *v.* Lake Shore & M. S. R. Co., 149 Mich. 278, 280, 112 N. W. 981; Southern R. Co. *v.* Simmons, 105 Va. 651, 665, 55 S. E. 459.

"These writs of certiorari were granted on a petition signed by counsel for petitioner who did not participate in the trial. It stated that the cases were of importance and were such a departure 'from the accepted and usual course of judicial proceedings, as to call for an exercise of this court's power of

supervision.' But this argument here was so inadequately prepared and exhibited such lack of familiarity with the record as not to be of assistance to the court, and in the argument of counsel on both sides who had participated in the trial below there was a want of that candor which is essential to the proper and adequate presentation of a cause in this court. The occasion seems appropriate to remind counsel that the attempted presentation of cases without adequate preparation and with want of fairness and candor, discredits the bar and obstructs the administration of justice."

The attitude of other Circuit Courts toward the interjection of irrelevant personalities and appeals to prejudice or passion is the same as that of the Fifth Circuit:

> "With respect to the alleged misconduct of counsel for plaintiff in his argument to the jury, his insinuation that opposing counsel had 'tried everything except the facts' had nothing whatever to do with the merits of the controversy between the parties. The remark was improper and offensive and the refusal of the court to direct the jury to disregard it was error. The attitude of this Court and of other federal appellate courts toward the interjection of irrelevant personalities and appeals to prejudice or passion in final argument, has been so clearly stated in many cases as to call for no further discussion. New York Central R. Co. *v.* Johnson, 279 U. S. 310, 317-319, 49 S. Ct. 300, 73 L. Ed. 706; Union Pacific R. Co. *v.* Field, 8 Cir., 137 F. 14; Brown *v.* Walter, 2 Cir., 62 F. 2d 798; F. W. Woolworth Co. *v.* Wilson, 5 Cir., 74 F. 2d 439, 442, 443, 98 A. L. R. 681; Chicago & N. W. Ry. Co. *v.* Kelly, 8 Cir., 74 F. 2d 31, 36, 37, Id., 8 Cir., 84 F. 2d 569, 573-576; London Guarantee & Accident Co. *v.* Woelfle, 8 Cir., 83 F. 2d 325, 338-344; Palmer *v.* Miller, 8 Cir., 145 F. 2d 926, 932; Chicago & N. W. Ry. Co. *v.* Green, 8 Cir., 164 F. 2d

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55, 64. This Court, in the interest of an orderly administration of justice, will continue to do all that reasonably may be done to assure litigants that a trial in a District Court of the United States shall be so conducted that the verdict of the jury fairly may be assumed to be based upon an impartial consideration of the evidence and the applicable law."

Kroger Grocery & Baking Co. v. *Stewart*, 164 F. 2d 841, 844.

It will be noted that the District Judge did not admonish plaintiff's counsel for his improper argument. When plaintiff's counsel in his concluding argument said "In my weak and humble way I am going to try to get this jury to bring in a verdict in this case that will help the people of Brunswick in some degree by making this arrogant railroad company adopt the Golden Rule in its operation of its railroad. Some of you gentlemen are from Brunswick and some of you are not, but I don't know how many boys have been killed or injured as a result of the operation of this railroad in and around Brunswick. I know of three that were killed in one car, besides this one," (R. 660) and defendant's counsel moved for a mistrial, all the trial court said was: "Gentlemen of the jury, of course any other accident that might have happened in connection with the Atlantic Coast Line Railroad Company would not be admissible in this case. So, you gentlemen confine yourself to the evidence in this case, and don't consider any statement counsel made about that" (R. 661). When counsel for plaintiff closed his argument, he asked the jury to "bring in a verdict in terms of the law in this case that (will?) shock this company into doing something about this operation" (R. 675). When defendant's counsel made a motion for a mistrial because of the prejudicial and inflammatory argument, the trial court out of the presence

of the jury in overruling the motion said: "I am going to instruct the jury that counsel have to be confined to the evidence, and to disregard any statement by counsel on either side, if any were made, for prejudicial purposes, and of course the jury would not render a verdict to shock anyone, but shall render a verdict according to the evidence and the law as given them in charge" (R. 676), but even this statement which implied that counsel for each side were guilty of making prejudicial statements was not given to the jury. What the trial court actually said when the jury came back was: "Now, gentlemen of the jury, before I commence to charge you, I want to instruct you to disregard any statements made by counsel relative to any matter other than the evidence that has been presented to you. Now, sometimes counsel may inadvertently make some statement that has no connection whatsoever with the case on trial, but you disregard any such statements and confine yourself solely to the evidence as presented in this case and the law as given you in charge by the Court. You just disregard entirely any statements that might have been made by either counsel in this case that is not supported by the evidence in this case" (R. 678). Not one word with reference to inflammatory or prejudicial argument. Not one word of rebuke to plaintiff's counsel for having indulged in such conduct. As a matter of fact the trial court did not at any stage of the trial ever reprimand plaintiff's counsel for any of the "out of bounds" conduct. This Court has held the public interest required the trial court of its own motion to protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice.[1] Where timely objections were accom-

[1] *New York Central R. R. Co.* v. *Johnson*, 279 U. S. 310, 318, 49 S. Ct. 300, 303, 73 L. Ed. 706; *Viereck* v. *U. S.*, 318 U. S. 236, 247, 87 L. Ed. 734, 741; *Union Pacific R. Co.* v. *Field*, 8 Cir., 137 F. 14, 15; *Missouri K-T R. Co.* v. *Ridgway*, 191 F. 2d 363, 369.

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panied by repeated motions for mistrial but the appeals to passion and prejudice went unrebuked[1] the Court of Appeals correctly found that the trial had been conducted "out of bounds".

Petitioner's brief mentions that the portion of plaintiff's counsel's argument contending for punitive damages (R. 136) was made while the jury was out of the room, but they conveniently overlook the fact that the same argument was made later by counsel in the presence of the jury (R. 151). When plaintiff's counsel made this statement in the presence of the jury, defendant's counsel objected, but the court permitted the argument to stand. Thus the statement in petitioner's brief that the "major part of the court's findings of prejudice to the jury was based * * * upon matter that was not before the jury" is not true. The matter was before the jury and plaintiff's counsel stressed it, even though on the first appeal the Court of Appeals had held this was not a case for punitive damages.

Conclusion.

1. Plaintiff's counsel is himself responsible for the second reversal of this case by his deliberate disregard of the rulings made by the Court of Appeals on the first appeal.

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[1] The first motion for mistrial was overruled without any rebuke to counsel for plaintiff for prejudicial argument; in fact, the Court seemed to find the statements all proper except that plaintiff's counsel had once represented the Southern Railway (R. 142). The second motion for a mistrial was overruled with a statement implying that the trial court thought the argument of plaintiff's counsel proper (R. 161). The third motion for mistrial was also overruled without any rebuke or admonition to plaintiff's counsel (R. 174). The fourth and fifth motions for mistrial have been dealt with before in this brief. They will be found at R. 661 and R. 677.

2. The decision of the Court of Appeals is right and amply supported by the record and the decisions of this Court. Further review is not warranted.

3. The petition for the writ of certiorari should be denied.

If for any reason this Court should see fit to grant the petition and issue the writ of certiorari, we respectfully request that we be given an opportunity to be heard on the merits of the case.

CHARLES L. GOWEN,
CHRIS B. CONYERS,
Attorneys at Law for the Respondent,
Post Office Address:
National Bank of Brunswick Building,
Brunswick, Georgia.

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